Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

DANIEL STEYSKAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), requires reversal of a sentence when drug quantity is not submitted to the jury and proved beyond a reasonable doubt, and the defendant is sentenced to a term of imprisonment beyond the maximum term applicable to the facts as found by the jury beyond a reasonable doubt.

2. Whether reversal of a conviction is required when the government improperly turned the potential conflict of interest of counsel for the Petitioner into an actual conflict of interest that prejudiced Petitioner's defense.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Daniel Steyskal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 5, 2000.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Eighth Circuit is reproduced in the appendix hereto, App. 1.

JURISDICTION

Petitioner was convicted by a jury after a grand jury returned a 2-Count indictment charging (Count I): Conspiracy to distribute and possess with intent to distribute marijuana in violation of Title 21, U.S.C. § 841(a)(1), § 846 and Title 18 U.S.C. § 2, and (Count II): Conspiracy to distribute and possess with intent to distribute anabolic steroids in violation of Title 21, U.S.C. § 841(a)(1), § 846 and Title 18 U.S.C. § 2. The weight of the substances contained in Counts I and II was not specified in the Indictment, and Petitioner was not subject to a mandatory minimum on the face of the Indictment.

Petitioner appealed his conviction and sentence to the Eighth Circuit Court of Appeals, which affirmed the District Court in all respects on July 5, 2000.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V, Constitution of the United States.

Amendment VI, Constitution of the United States.

STATUTES INVOLVED

Title 21, U.S.C. § 841

All are reproduced in the appendix to this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On April 23, 1999, a two-count Indictment was returned, charging the Petitioner with conspiracy to distribute marijuana and anabolic steroids, in violation of Title 21, U.S.C. § 841(a)(1), § 846 and Title 18 U.S.C. § 2. On August 6, 1999, a jury convicted Petitioner of both counts, but made no specific findings concerning the weight of the controlled substances involved.

A presentence investigation report was prepared by the U.S Probation Office in Omaha, Nebraska, to which the Petitioner filed objections. A hearing on the Petitioner's objections to the Revised Presentence Report was

held on December 21, 1999. The sentencing court concluded that the Petitioner should be held responsible for a combined weight of marijuana (after converting the other substances to marijuana), of 868.3234 kilograms, and calculated his base offense level at 30.

Petitioner was sentenced to a term of imprisonment of 210 months on Count I, and 60 months on Count II, to be served concurrently. (App. 8).

Petitioner timely filed his Notice of Appeal in the U.S. Court of Appeals for the Eighth Circuit, which affirmed the District Court in all respects on July 5, 2000. Petitioner timely filed his Petition for Writ of Certiorari in this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI AND REMAND THIS CASE TO THE EIGHTH CIRCUIT IN LIGHT OF THE DECISION IN *APPRENDI v. NEW JERSEY*, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), BECAUSE DRUG QUANTITY WAS NOT SUBMITTED TO THE JURY AND PROVED BEYOND A REASONABLE DOUBT, AND PETITIONER WAS SENTENCED TO A TERM OF INCARCERATION BEYOND THE STATUTORY MAXIMUM TERM APPLICABLE TO THE FACTS AS FOUND BY THE JURY BEYOND A REASONABLE DOUBT

On June 26, 2000, this Court decided *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Apprendi advanced a constitutional rule that any fact, other than a prior conviction, which increases a statutory maximum sentence must be submitted to a jury and proved beyond a reasonable doubt. New constitutional rules of criminal procedure apply to cases on direct federal or state appeal at the time the rule was announced, *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Petitioner's case was decided by the Eighth Circuit on July 5, 2000.

Petitioner was charged in the Indictment with conspiracy to distribute marijuana and conspiracy to distribute anabolic steroids, Title 21, U.S.C. § 841(a) and § 846. No amounts or statutory maximums were detailed in the Indictment, and the jury was not instructed to, nor did it, make specific findings with respect to the weight of the controlled substances involved. Title 21, U.S.C. § 841(b) details the penalties for a violation of Title 21, U.S.C. § 841(a), and includes four sections involving marijuana:

Statute:	**Penalty:**
1) Title 21, U.S.C. § 841(b)(1)(A)(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana.	10 years to life imprisonment
2) Title 21, U.S.C. § 841(b)(1)(B)(vii) 100 kilograms or more of a mixture or substance containing a detecabele amount of marijuana.	5-40 years imprisonment

3) Title 21, U.S.C. § 841(b)(1)(C) In the case of a controlled subsatnce in schedule I or II[1]	Not more than 20 years imprisonment
4) Title 21, U.S.C. § 814(b)(1)(D) In the case of less than 50 kilograms of marijuana or any controlled substance in schedule III[2]	Not more than 5 years imprisonment

The amount of the controlled substances (marijuana and anabolic steroids) was not submitted to the jury and decided beyond a reasonable doubt. That determination was made after a presentence investigation was completed, and decided by the trial judge by a preponderance of the evidence. The Court's charge to the jury (App. 37-45), omits any reference to the weight of the controlled substances involved, and the indictment is silent with respect to the amount of controlled substances involved as well. (App. 5-6).

As charged in the indictment, the maximum sentence on each count of the indictment faced by the defendant was no more than 5 years imprisonment unless the facts

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[1] Marijuana is classified as a Schedule I Controlled Substance Title 21, U.S.C. § 812.

[2] Anabolic Steriods are classified as a Schedule III Controlled Substance, Title 21, U.S.C. § 812.

which increased the maximum sentence were submitted to the jury and proved beyond a reasonable doubt.

In *United States v. Nordby*, 2000 WL 1277211 (9th Cir. 2000), a case with similar facts, the 9th Circuit Court of Appeals decided that *Apprendi* required resentencing the defendant to the "maximum sentence supported by the facts found by the jury beyond a reasonable doubt."

Nordby was convicted of violations of Title 21, U.S.C. § 841 and § 846. The court instructed the jury that it need not determine the amount of marijuana manufactured, and the jury made no specific findings as to weight. Nordby was sentenced to 10 years in prison after the weight of the marijuana was determined by a judge by a preponderance of the evidence.

The 9th Circuit reversed, finding Nordby's maximum exposure under the facts found by the jury beyond a reasonable doubt was 5 years imprisonment under 21 U.S.C. § 841(b)(1)(D), and ordered him resentenced.

In *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000), decided after *Apprendi*, the Eighth Circuit Court of Appeals reviewed its established precedent (drug quantity determined at sentencing by a preponderance of the evidence), and acknowledged that *Apprendi* requires reversal when the jury does not make a specific finding with respect to drug quantity, and reaffirmed its position that a case on direct appeal is governed squarely by *Apprendi*. Petitioner respectfully suggests that the Eighth Circuit Court of Appeals be given the opportunity to review this case in light of *Apprendi*.

II.

REVERSAL OF PETITIONER'S CONVICTIONS IS REQUIRED BECAUSE THE GOVERNMENT IMPROPERLY TURNED A POTENTIAL CONFLICT OF INTEREST OF COUNSEL FOR PETITIONER INTO AN ACTUAL CONFLICT OF INTEREST THAT PREJUDICED PETITIONER'S DEFENSE

One of the two lawyers representing Steyskal at trial, Louis Palazzo, also represented John Britton, a witness called by the government. The district court and counsel for Steyskal took steps to assure that any potential conflict of interest which resulted from Palazzo's dual representation would not ripen into an actual conflict during trial. However, the government blatantly ignored those safeguards and during its direct-examination of Britton, and Trooper Dyer and during closing argument, caused Palazzo's potential conflict to blossom into an actual conflict. The government intentionally caused the conflict to prejudice Steyskal's defense. As a result of the government's misconduct, Steyskal's convictions must be reversed.

When defense counsel is burdened by an actual conflict of interest, reversal is required if the district court is aware of that conflict and fails to take any steps to correct it. *Wood v. Georgia*, 450 U.S. 261, 272, fn. 18 (1981). Steyskal argues that the district court was well aware of the actual conflict and utterly failed to take any steps to correct it once the government had created it. In the alternative, as will be discussed more fully below, the defendant must show that an actual conflict prejudiced his defense. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1979). Steyskal contends in any event that his defense was

adversely affected by the actual conflict of interest which the government caused to ripen during trial.

Before opening statements were given, defense counsel alerted the district court to a potential conflict of interest. Louis Palazzo, defense counsel for Steyskal, informed the court that he was then representing John Britton, a witness identified by the government as a witness who might be called by it, in federal court in Wyoming. Britton had been arrested in Wyoming driving a vehicle which was found to contain 200 pounds of marijuana. It was the government's theory that the marijuana was bound for Omaha where it was to be delivered to Steyskal. The government indicated, however, that: "I don't know whether he'll (Britton) testify or not." (App. 47). Palazzo indicated that any potential conflict could be avoided if he did not cross-examine Britton and co-counsel Herzog could conduct that cross-examination. Counsel for Steyskal also indicated that Steyskal was willing to waive any trial conflict involving Palazzo. (App. 52).

The district court took up the potential conflict issue again the next morning. (App. 48-54). Palazzo stated that he would not cross-examine Britton and that he had "erected what would be, by analogy, a Chinese wall between himself and Mr. Herzog as it relates to matters concerning Mr. Britton. So there's been no communication from myself to Mr. Herzog as it relates to any confidential communications that I previously had with Mr. Britton." (App. 48-54). Counsel also informed the court that they had explained to Steyskal the implications of Palazzo's common representation of him and Mr. Britton and that Steyskal was prepared to waive any such conflict (App. 52). Thereafter, Steyskal did agree to waive any

potential conflict of interest by the fact that Palazzo represented Britton in Wyoming. (App. 54).

That should have been the end of the matter. When Britton did eventually testify he was not cross-examined by Palazzo. Indeed, defense counsel conducted no cross-examination of Britton at all. (App. 59).

However, the government had other ideas. During its direct examination of Britton, the government asked Britton if he was "facing any charges" as a result of his arrest in Wyoming. Immediately after Britton said he was facing charges in Wyoming, counsel for the government asked Britton "who's your attorney." When Britton responded that Palazzo was his attorney, counsel for the government added: "The person that represents Mr. Steyskal; is that right?" Over defense objection, counsel for the government also asked when Britton had first met Palazzo and where his office was located. Britton responded that Palazzo's office was located in Las Vegas, Nevada. Counsel for the government then went on to ask Britton how Palazzo came to be his lawyer in Wyoming and whether he paid for Mr. Palazzo's services. (App. 43).

Still later in the government's direct examination of Britton, the government returned to its theme. It again asked Britton: "Did you get the name of Mr. Palazzo for an attorney from Steyskal?" Counsel for the government also asked Britton whether Steyskal had paid "your legal bill for Mr. Palazzo." Britton responded that he had not. Counsel for the government then asked Britton again, "how was it that you chose Mr. Palazzo, Sir, as your representative?" (App. 57-59). After repeated defense

objections to this line of questioning, a bench conference was held out of the hearing of the jury. During this conference, the government articulated its position. Counsel for the government stated:

> The association between the two individuals and being represented by the same lawyer when he's arrested in Laramie, Wyoming and this guy (Palazzo) practices out of Las Vegas, Nevada is, in fact for the jury. . . . I would argue that it is too big of a coincidence. As least it's a relevant fact, your honor, that he still represents him and that goes to motive. (App. 57).

After the bench conference, the government returned to its theme again. Counsel for the government again asked Britton when he retained Palazzo and how he got his name. Britton responded that he retained Palazzo shortly after he got arrested and one of his parents, "either my mother or my father got his name somehow." (App. 58). Defense counsel conducted no cross-examination of Britton. (App. 59).

The government did not stop with Britton. Its very next witness was Wyoming State Trooper Dan Dyer. Dyer was the officer who had arrested Britton in Laramie, Wyoming. Counsel for the government asked Dyer if charges were still pending against Britton in Wyoming. When Dyer responded that they were, counsel for the government asked: "And who represents him in that action?" After the government asked Dyer if he had appeared in any court proceedings in that case, it asked him if he had been subject to cross-examination, and if so "by who?" Dyer responded: "By Mr. Palazzo from Las Vegas, I believe." (App. 61-62). Later, counsel for the

government asked Dyer if Britton requested a lawyer at the time of his arrest. Dyer responded that he had, that Britton "didn't give any names, but he said he had a lawyer that he knew in Las Vegas and one in Omaha." (App. 62).

Almost immediately after this exchange, Steyskal moved for a mistrial. (App. 63). The court denied that motion without even hearing a response from the government. (App. 63).

Finally, when the government had an Omaha police officer testify about alleged drug ledgers found in a notebook in Steyskal's residence when a search warrant was executed on January 19, 1999, it had the officer read the following out of one of the notebooks: "The name is Louie Palazzo, 520 South 4th Street, Las Vegas, Nevada." (App. 65).

In its closing argument, the government again returned to its theme. Regarding Britton, counsel for the government argued:

> When Mr. Britton took the stand I didn't know what he was going to say. I suspected he was going to say that he brought it (the marijuana found in Britton's vehicle) in for himself because he didn't have to pin it on anyone else, its only himself.
>
> But he said no. He said it was someone else. We know why. He isn't going to hurt him (Steyskal) because he's represented by him (Palazzo), the same guy as represented by him. That was obvious. (App. 66).
>
> (Defense objection).

At sentencing, Steyskal was held responsible for the 200 pounds of marijuana found in Britton's vehicle. (App. 67).

The Sixth Amendment right to counsel "includes the right to the assistance of an attorney unhindered by a conflict of interest." *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982), quoting from *Cuyler v. Sullivan*, supra, 446 U.S. at 355 (1979) (Marshall J., concurring and dissenting opinion). "Although conflicts may arise when an attorney simultaneously represents clients with different interests, joint representation of multiple interested parties by a single attorney is not a *per se* violation of a defendant's right to effective assistance of counsel." *United States v. Reed*, 179 F.3d 622, 624 (8th Cir. 1999); *United States v. Acty*, 77 F.3d 1054, 1056 (8th Cir. 1996). However, if an actual conflict does exist, "prejudice is presumed" and reversal required if the defense at trial is "adversely affected." *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996).

Counsel for Steyskal were aware of a potential conflict of interest and properly brought that potential conflict to the attention of the district court. Before opening statements were given, counsel alerted the court to that fact that Palazzo represented Britton in Wyoming and that Britton may be a government witness at trial. (App. 47). However, at that time all that was presented was a theoretical conflict of interest. *Simmons v. Lockhart*, 915 F.2d 372, 380 (8th Cir. 1990) (trial counsel for Simmons previously represented Davis, a witness for the prosecution).

Counsel for Steyskal took affirmative steps to insure that the potential conflict would not ripen into an actual conflict that could adversely affect Steyskal at trial. See, e.g. *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996): "the chosen method for dealing with a potential conflict, in the absence of an acceptable waiver, is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel."

First, Steyskal, agreed to waive the **potential** conflict of interest **but only as it then existed**. (App. 53-54).[3] Secondly in recognition that in "successive representation situations" a conflict may affect the defense at trial when counsel is "tempted to use that confidential information" he obtained from one client to impeach the other or when counsel fails to conduct a rigorous cross-examination for fear of misusing his confidential information, Counsel for Steyskal erected a "Chinese wall" between Palazzo and Herzog and agreed that any cross-examination of Britton would be conducted by Herzog and not Palazzo. *United States v. Agosto*, supra, 675 F.2d at 971. See also *United States v. Flynn*, supra, 87 F.3d at 1001 (he defense may be adversely affected "where counsel's cross-examination of a former client is impeded for fear of misusing confidential information") and *Simmons v. Lockhart*, supra, 915 F.2d

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[3] Although the waiver procedure employed by the trial court was marginally sufficient when the conflict of interest was only a potential one, it was clearly insufficient once Palazzo's dual representation of Britton and Steyskal was made known to the jury. After this fact had been made known, the trial court had an affirmative duty to again inquire of Steyskal whether he would waive the conflict. *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977).

at 379 (no adverse effect shown where counsel "cross-examined Davis every bit as vigorously as a lawyer without an arguable conflict would have done.").

Thus, after defense counsel and the district court had utilized "means of eliminating the potential conflict less burdensome than disqualification," no conflict should have arisen at trial and Steyskal's defense should not have been "adversely affected" by Palazzo's representation of Britton. *United States v. Agosto*, supra, 675 F.2d at 973. Indeed, no cross-examination of Britton was conducted by defense counsel.

However, the government unilaterally forced the potential conflict to ripen into an actual conflict that adversely affected Steyskal's defense. Through its questioning of Britton and Trooper Dyer, the government was able to establish, over repeated defense objections, something that the jury would never have otherwise learned; counsel for Steyskal, Louis Palazzo, represented Britton as well. Once having established that fact, the government was further able to develop the inference that Britton associated with Steyskal in the marijuana business. How else, the government inferred, could Steyskal, in Omaha, and Britton, who was arrested in Wyoming, end up with the same lawyer from Las Vegas? The government even inferred that Steyskal had paid Palazzo's fee for representing Britton and argued in its closing summation to the jury that Britton lied when he denied transporting marijuana for Steyskal because Britton and Steyskal were represented by Palazzo. (App. 56-57 & 66). In short, by disclosing Palazzo's dual representation to the jury, the government was able to argue that Britton's claim that he had not transported marijuana for Steyskal

was a lie and that Britton was, in fact, a member of the alleged conspiracy. The government's reference to Palazzo's potential conflict as a "relevant fact" for the jury to consider in evaluating Britton's motive to testify that he had not participated in the charged conspiracy demonstrates that it was the government's position that the jury should consider Palazzo's potential conflict as a material fact adverse to Steyskal. (App. 57).

The situation here is not unlike that presented in *Dawan v. Lockhart*, 31 F.3d 718 (8th Cir. 1994). There the same attorney represented both Dawan and Stout. Prior to trial, Stout plead guilty and gave a statement implicating Dawan. Prior to trial, the prosecutor indicated that he would not call Stout as a witness at trial. At Dawan's trial, however, defense counsel called Stout as a witness and Stout stated on direct examination that "Dawan was in no way involved in the perpetration of the crime." *Id.* at 720. Defense counsel did not ask Stout about his prior statement implicating Dawan. On cross-examination, the prosecuting attorney "did ask Stout about his prior sworn testimony and highlighted the fact that Dawan's counsel was the attorney who had represented Stout when the statement was made." *Id.* The Court found that trial counsel's representation of both Dawan and Stout adversely affected Dawan's defense. In particular, the Court noted that the trial prosecutor "underscored that the same attorney currently representing Dawan had also represented the witness who changed his story. The prosecutor's comments made Dawan's attorney look less credible and, by extension made Dawan less credible as well. This is a sufficient adverse effect for purposes of Cuyler." *Id.*, at 722.

Similarly here, the government presented Palazzo's dual representation, a fact otherwise unknown to the jury, as evidence that Britton was lying when he claimed he did not transport marijuana for Steyskal. Like Dawan, Steyskal was adversely affected by the government's use of defense counsel's dual representation as a highly prejudicial evidentiary fact in support of the defendant's guilt. Thus, as the Court concluded in *Dawan*, Steyskal's convictions must be reversed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and this case remanded to the Eighth Circuit Court of Appeals for reconsideration in light of *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Alternatively, this Court should vacate the decision of the Eighth Circuit and remand the case for a new trial.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1133

United States of America, Appellee, v. Daniel Steyskal, Appellant.	* * * * * * *	Appeal from the United States District Court of Nebraska [UNPUBLISHED]

Submitted: June 13, 2000
Filed: July 5, 2000

Before: **WOLLMAN**, Chief Judge, **McMILLIAN**, Circuit Judge, and **PANNER**,[1] District Judge

PER CURIAM

Daniel Steyskal was charged and convicted by a jury of conspiracy to possess and distribute marijuana and anabolic steroids. He argues on appeal that he was denied conflict-free counsel and that the district court[2] improperly enhanced his sentence for gun possession and miscalculated the drug quantities. We reject these arguments and we affirm.

[1] The Honorable Owen M. Panner, United States District Judge for the District of Oregon, sitting by designation.

[2] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

1. Conflict-Free Representation

Steyskal submits that he was denied his Sixth Amendment right to conflict-free representation when the jury was permitted to learn that one of his attorneys also represented a government witness. His attorney's conflict, of course, was evident prior to trial. Indeed, the court expressed concern with the attorney's participation and the conflict of interest that it created. Steyskal insisted, however, that he be permitted to have counsel of his choice and he expressly waived any potential or actual conflict. Such a waiver would arguably eliminate our review of any alleged conflict of interest. *See United States v. Brekke*, 152 F.3d 1042, 1045-46 (8th Cir. 1998); *United States v. Ayd*, 25 F.3d 624, 627 (8th Cir. 1994). Moreover, the mere fact that counsel represented a government witness "does not suffice to entitle [Steyskal] to relief." *See Simmons v. Lockhart*, 915 F.2d 372, 378 (8th Cir. 1990). Rather, Steyskal must show "an actual and demonstrable effect of the conflict, and not merely an abstract or theoretical one." *See id.*

While we agree with Steyskal that admission of the testimony was problematic, we simply cannot conclude that Steyskal suffered such prejudice so as to warrant reversal of his conviction. *See id.* Moreover, although the government's comments to the jury on the dual representation and the inference of common drug dealings may have been inopportune, we conclude that, given the record as a whole, the statements could not have affected the jury's verdict and therefore did not deprive Steyskal of a fair trial. *See United States v. Wiley*, 29 F.3d 345, 351-52 (8th Cir. 1994).

2. Sentencing

The district court properly enhanced Steyskal's sentence for possessing a gun during the commission of his drug offense. Evidence that a defendant exchanged drugs for a weapon is sufficient to establish the nexus for enhancement. *See United States v. Newton*, 184 F.3d 955, 958 (8th Cir. 1999); *United States v. Rogers*, 150 F.3d 851, 858 (8th Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999). Similarly, evidence that a gun is found in a residence shared by others but in close proximity with drugs is sufficient to establish the requisite possession. *See United States v. Alatorre*, 207 F.3d 1078, 1079 (8th Cir. 2000).

The court did not improperly calculate the quantity of drugs. There was sufficient, credible testimony regarding the amount of drugs involved in the crimes. *See United States v. Purvis*, 114 F.3d 737, 740-41 (8th Cir. 1997). Moreover, sufficient evidence linked the shipments of drugs to Steyskal. *See United States v. Granados*, 202 F.3d 1025, 1028-29 (8th Cir. 1998). Finally, no plain error occurred when the district court referenced "steroids" rather than "anabolic steroids."

We affirm the conviction and sentence imposed by the district court.

A true copy

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1133NEO

United States of America, Appellee, vs. Daniel Steyskal, Appellant.	* * * * * * *	Appeal from the United States District Court for the District of Nebraska

JUDGMENT

(Filed July 31, 2000)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

July 5, 2000

A true copy

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,	)	8:99CR-60
	)	**INDICTMENT**
	)	(21 U.S.C. § 846)
v.	)	(18 U.S.C. 2)
DANIEL STEYSKAL, Defendant.	)	(Filed April 23, 1999)

The Grand Jury charges:

COUNT I

From on or about December 12, 1997, to February 1, 1999, in the District of Nebraska and elsewhere DANIEL STEYSKAL, defendant herein, did willfully and knowingly, combine, conspire, confederate and agree together, with other persons both known and unknown to the Grand Jury, to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

In violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

COUNT II

From on or about December 12, 1997, to February 1, 1999, in the District of Nebraska and elsewhere DANIEL

STEYSKAL, defendant herein, did willfully and knowingly, combine, conspire, confederate and agree together, with other persons both known and unknown to the Grand Jury, to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of anabolic steroids, its salts, isomers, or salts of its isomers, including but not limited to mesterolone, methandrostenolone, stanozolol, and testosterone, a Schedule III controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ [Illegible]
FOREPERSON

/s/ Thomas J. Monaghan
THOMAS J. MONAGHAN
United States Attorney

The United States of America requests that trial of this case be held in Omaha, Nebraska pursuant to the rules of this Court.

/s/ Maria R. Moran
MARIA R. MORAN
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	JUDGMENT IN A CRIMINAL CASE
Plaintiff,	CASE NUMBER 8:99 CR-60
vs.	David Herzog T. Louis Palazzo Defendant's Attorney
DANIEL STEYSKAL,	
Defendant.	(Filed Jan. 3, 2000)

THE DEFENDANT:

was found guilty on count(s) I and II after pleas of not guilty.

Accordingly, the defendant is adjudged guilty of such amount(s) which involve the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 841(a)(1) and 846	Conspiracy to distribute and possess with intent to distribute marijuana	2/1/99	I
21 U.S.C. 841(a)(1) and 846	Conspiracy to distribute and possess with intent to distribute anabolic steriods	[2/1/99]	II

The defendant is sentenced as provided in pages 2 through 11 of this Judgment. The sentence imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 505-96-2034

Defendant's Date of Birth: April 10, 1971

Defendant's USM No.: 26431-013

Defendant's residence address: 15506 S. 69th St.
Papillion, NE 68133

Defendant's mailing address: Same

December 21, 1999
Date of Announcement of Judgment

/s/ [Illegible]
Signature of Judicial Officer

WILLIAM G. CAMBRIDGE
UNITED STATES DISTRICT JUDGE

January 3, 1999
Date of Entry of Judgment

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant Daniel Steyskal is hereby committed to the custody of The Bureau of Prisons to be imprisoned for a term of two hundred ten (210) months. This term consists of a term of 210 months on count I and a term of 60 months (instead of 210

months imposed in error from the bench on December 21, 1999) on count II, to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

1) On the court's own motion, the defendant shall be provided with education, vocational training and such services as may be available to assist the defendant with any drug/alcohol abuse problem, including, without limitation, diagnosis, evaluation, treatment and counseling.

2) On the court's own motion, the defendant shall be provided with long-term intensive treatment for drug/alcohol abuse (i.e., the nine-month, five hundred-hour comprehensive drug treatment program of the Bureau of Prisons) with the other such services.

3) On motion of the defendant, the defendant shall be imprisoned at a facility as close as possible to Nebraska, e.g., Yankton, South Dakota.

The defendant is remanded to the custody of the United States Marshal.

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of this judgment this ____ day of ____, 19___.

_____

Signature of defendant

RETURN

It is hereby acknowledged that the Defendant was delivered on the ____ day of ____ 19___ to _____ with a certified copy of this judgment.

_____
UNITED STATES WARDEN
By: _____

NOTE: the following certificate must also be completed if the defendant has not signed the Acknowledgment of Receipt, above.

CERTIFICATE

It is hereby certified that a copy of this judgment was served upon the defendant this ____ day of _____, 19___.

_____
UNITED STATES WARDEN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant Daniel Steyskal shall be on supervised release for a term of five (5) years. This term consists of a term of five (5) years on count I and a term of three (3) years on count II to be served concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall between the hours of 8:00 a.m. and 4:30 p.m. report in person to the probation office in the district responsible for the supervision of the defendant, i.e., to the supervisory unit of the United States Probation Office for the

District of Nebraska, Federal Court Building, Omaha, Nebraska, unless otherwise notified in writing.

While on supervised release the defendant shall, except as may hereinafter be otherwise expressly provided, comply with the standard conditions (hereafter set forth) that have been adopted by this court for supervised release and the defendant shall comply with the following additional conditions:

1) Paragraph 8 of the standard conditions of supervision is modified, i.e., instead of merely refraining from excessive use of alcohol, the defendant shall not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.

2) The defendant shall attend, pay for and successfully complete any diagnostic evaluation, treatment or counseling program, or approved support groups (e.g., **AA/NA**) for alcohol and/or controlled substance abuse, as directed by the United States Probation officer.

3) The defendant shall submit to a drug test within fifteen (15) days of release on supervised release and at least two (2) periodic drug tests thereafter for use of a controlled substance and shall further submit to such testing as any person involved in supervising the defendant's supervised release may request to detect the presence of alcohol or controlled substances in the defendant's body fluids and to determine whether the defendant has used any of them. Defendant shall pay for the collection of samples to be tested for the presence of alcohol and/or controlled substances.

4) The defendant shall be subject to the search of the defendant's premises, vehicle or person, day or night, with or without a warrant, at the request of the United States Probation officer to determine the presence of alcohol and/or controlled substances, firearms or any other contraband. Any such items found may be seized by the United States Probation Officer. This condition may be invoked with or without the cooperation of law enforcement officers.

5) The defendant shall provide the United States Probation officer with access to any requested financial information.

6) The defendant shall complete 300 hours of community service as approved and directed by the United States Probation officer. The defendant shall be responsible for providing the United States Probation officer with written proof of the number of hours completed as directed.

7) The defendant shall pay for the defendant's supervision at the then current rate unless reduced, commensurate with the defendant's ability to pay, in accordance with a schedule fixed and determined from time to timeby the probation officer and approved by the Court (this condition being imposed pursuant to 18 U.S.C. § 3583 (d) as a further condition of supervised release and not as a fine).

8) The defendant shall not enter into any contract, transaction or arrangement of whatsoever kind or nature with any financial institution or obtain any loan or line of credit from any person or entity without first having

obtained the written approval of the U.S. Probation Officer.

The Court directs that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and supervision as is required.

Pursuant to subdivision (b)(6)(A) of Rule 32 of the Fed. R. Crim. P., the probation officer is directed not to disclose the probation officer's recommendation on the sentence.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to

the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer at least 10 days prior to any change of residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered or other places specified by the Court;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

15) the defendant shall not own, possess, or control any firearms or ammunition, destructive devices, or dangerous weapons.

16) The defendant shall pay any special assessment fine or restitution obligation imposed by this judgment that remains unpaid at the commencement of the term of probation or supervised release in accordance with the Payment Schedules of Criminal Monetary Penalties set forth in the judgement.

17) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

These conditions are in addition to any other conditions imposed by this Judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay a special assessment of $100.00 per count or a total of $200.00.

PAYMENT SCHEDULE
OF
CRIMINAL MONETARY PENALTIES

Payment of any special assessment shall be due in full immediately.

All payments made by the defendant on any special assessment are to be made to the office of the Clerk, United States District Court, Federal Courthouse, Omaha, NE 68102.

The Clerk of this Court will credit the defendant for all payments, if any, previously made by the defendant toward any special assessment imposed.

This judgment imposes a period of imprisonment and payment of criminal monetary penalties shall be due during the period of imprisonment.

RIGHT TO APPEAL

The defendant is advised of the defendant's right to appeal [including the right to appeal] the sentence imposed by the court and of the defendant's right to appeal in forma pauperis if the defendant is unable to pay the costs of an appeal provided the defendant meets the requirements for any such appeal. Except as otherwise provided by law or rule, any such notice of appeal must be filed by the defendant with the clerk of this court within ten (10) days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

REPORT OF STATEMENT OF REASONS FOR SENTENCE IMPOSED

I. FINDINGS OF FACT:

The court adopts as the court's findings of fact the probation officer's determinations of fact contained in the presentence investigation report as to which there is no objection, and as to controverted factual statements, resolves the dispute(s) and makes further findings of fact as follows:

The defendant's objection to paragraph 1 of the revised presentence investigation report is overruled because Count II of the indictment does contain the language objected to by the defendant.

The defendant's objections to paragraph 6 through 16 of the revised presentence investigation report are overruled, all for the reasons set forth in the probation officer's November 15, 1999, addendum to the presentence report.

The defendant's objections to paragraphs 17 through 32, inclusive, of the revised presentence investigation report are overruled because the matter objected to is merely the government's versions of the offenses, not determinations of fact made by the probation officer and therefore not subject to objection because it is clear the government submitted that version

The defendant's objections to paragraphs 47, 53, 54, 55, 56 and 61 of the revised presentence investigation are overruled because the defendant is chargeable with a total of approximately 868.3234 kilograms of marijuana and steroids, all as set forth on the record.

The defendant's objection to paragraph 50 of the revised presentence investigation report is overruled, the Court finding that the defendant has not clearly accepted responsibility for the offenses.

The defendant's objections to paragraph 52 of the revised presentence investigation report are overruled, all for the reasons set forth in the November 15, 1999 addendum prepared by the probation officer to the revised presentence investigation report.

The defendant's objections to paragraphs 53, 54, and 55 of the revised presentence investigation report are sustained to the extent that they are consistent with the findings made with regard to the quantities of drugs and overruled to the extent that they are inconsistent with those findings.

The defendant's objections to paragraph 57 of the revised presentence investigation report are overruled, the defendant having possessed a dangerous weapon and it not being clearly improbable that the weapon was connected with the offense.

The defendant's objections to paragraph 59 of the revised presentence investigation report are overruled, the Court finding that the defendant was an organizer and leader of the criminal activity that involved five or more participants and was otherwise extensive.

The defendant's objection to paragraph 68 of the revised presentence investigation report is overruled because the criminal offenses set forth in the revised presentence investigation report have been properly

included and are properly calculated in determining the defendant's criminal history and category.

Defendant's objections to paragraphs 71 and 79 of the revised presentence investigation report are overruled because they've been properly included within the revised presentence investigation report.

II. APPLICATION OF GUIDELINES TO FACTS:

A question of guideline application has arisen with respect to certain conclusions contained in the revised presentence investigation report. The court resolves those question(s) as follows and determines that the applicable guidelines are as follows:

In view of the Court's foregoing findings of fact, the defendant's base offense level as set out in paragraph 56 of the revised presentence investigation report is amended to read 30 instead of 32 due to the quantity of controlled substances involved.

The defendant's offense level must be increased by two levels for possession of the dangerous weapon under U.S.S.G. § 2D1.1(b)(1) and the defendant's offense level must also be increased by four offense levels pursuant to United States Sentencing Guideline Section 3B1.1 (a) for being an organizer and leader, all as proposed in the revised presentence investigation report.

Total offense level 36

Criminal History Category II

210 to 262 months of imprisonment

4 to 5 years of supervised release on court I and 2 to 3 years on count II

$20,000 to 2,000,000 fine (plus cost of imprisonment/ supervision)

$-0- restitution

$100.00 special assessment per count

III. STATEMENT OF REASONS:

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason that it is sufficient to satisfy the factors hereinafter referred to.

Although it does not appear the defendant is addicted to alcohol, he has had an addiction to other drugs. According to the National Institute on Drug Abuse, the use of any intoxicants, including alcohol, limits a recovering person's ability to maintain a drug-free lifestyle. Although many factors may contribute to use, resisting full abstinence usually indicates unextinguished addiction, and recovering addicts are usually already addicted to a broad range of drugs. Also, relapse to one's drug-of-choice often results from using other drugs, and any drug, including alcohol, can become addictive in and of itself. Consequently, the use of any intoxicant not only limits a recovering person's ability to learn to maintain a drug-free lifestyle, it severely limits full affiliation with other recovering people who can serve as positive role models to a newly recovering person. The use of alcohol poses other societal risks such as the possibility of new criminal charges (Drunken Driving, Assault, etc.) It is also difficult to determine what is

"excessive use of alcohol" since the tolerance to alcohol varies from person to person. In short, allowing a recovering person to use alcohol is inconsistent with the treatment philosophy of Alcoholics Anonymous, Narcotics Anonymous and most 12-step recovery programs nationwide.

The court having considered the factors set out in 18 U.S.C., Section 3553, finds that the sentence(s) imposed is/are required.

IV. FINE:

A lump sum cash fine within U.S.S.G. # 5E1.2(c) has not been imposed for the reason that it appears that the defendant does not have the present ability to pay one and is not likely to become able to pay one.

CLERK'S OFFICE USE ONLY:

I certify this to be a true copy of the record in my custody.

GARY D. MCFARLAND, CLERK
By _____

U.S. Const. Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C.A. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that

authorized in accordance with the provisions of Title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable

amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in

addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if

the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance

with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior

conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means

that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of

a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Redesignated (f)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

INSTRUCTION NO. 5

The crime of conspiracy to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of marijuana as charged in Count I of the indictment has three essential elements, which are:

One, from on or about December 12, 1997, to February 1, 1999, in the District of Nebraska and elsewhere, two or more persons reached an agreement or came to an understanding to distribute or to possess with intent to distribute a mixture or substance containing a detectable amount of marijuana;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached, or at some time later while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

For you to find the defendant guilty of this crime, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty.

The government must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the indictment.

The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In determining whether the alleged conspiracy existed you may consider the actions of the following persons: Daniel Steyskal, Chad Hamor, Jacob Dailey, Bret McNaboe, Thomas Holzapfel, Jean Pierre Brownell, Jon Mullins, Freddie Lewis, Mike Aylward, Greg Nesbit, Charles Keenan, Joshua Teegarten, John Britton, and Paul Hawley. During the trial you also heard testimony that statements were made before the trial by Daniel Steyskal,

John Britton, Paul Hawley, Jon Mullins, Joshua Teegarten, Freddie Lewis, and Greg Nesbit. If you find that such before-the-trial statements were made, you may consider them in deciding whether the alleged conspiracy existed and whether the defendant joined it. The agreement may also be inferred from all the circumstances and the conduct of those persons just named.

It is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of a conspiracy and in furtherance of it as evidence pertaining to a defendant even though they were done or made in the absence of and without the knowledge of a defendant. This includes acts done or statements made before a defendant had joined the conspiracy, for a person who knowingly, voluntarily, and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy. Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.

Count I of the indictment charges a conspiracy to commit two separate crimes or offenses, i.e., conspiracy to distribute a mixture or substance containing a detectable amount of marijuana, and conspiracy to possess such a mixture or substance with the intent to distribute it. It is not necessary for the government to prove a conspiracy

to commit both of those offenses. It would be sufficient if the government proves, beyond a reasonable doubt, a conspiracy to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses was the subject of the conspiracy. If you cannot agree in that manner, you must find the defendant not guilty.

To assist you in determining whether there was an agreement or understanding to commit the crime of distribution or to commit the crime of possession with intent to distribute a mixture or substance containing a detectable amount of marijuana as required by element one of this instruction, you are advised that the elements of the actual crime of distribution of such a mixture or substance would be as follows:

First, a person intentionally transferred such a mixture or substance to another person; and

Second, at the time of the transfer, the person making the distribution knew that it was such a mixture or substance.

You are further advised that the elements of the actual crime of possession with intent to distribute such a mixture or substance would be as follows:

First, a person was in possession of such mixture or substance;

Second, such person knew that he was or intended to be in possession of such a mixture or substance; and

Third, such person intended to distribute some or all of such mixture or substance to another person.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

INSTRUCTION NO. 6

The crime of conspiracy to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of anabolic steroids, as charged in Count II of the indictment, has three essential elements, which are:

One, from on or about December 12, 1997, to February 1, 1999, in the District of Nebraska and elsewhere, two or more persons reached an agreement or came to an understanding to distribute or to possess with intent to distribute a mixture or substance containing a detectable amount of anabolic steroids;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached, or at some time later while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

For you to find the defendant guilty of this crime, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty.

The government must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the indictment.

The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In determining whether the alleged conspiracy existed you may consider the actions of the following persons: Daniel Steyskal, Chad Hamor, Jacob Dailey, Bret McNaboe, Jean Pierre Brownell, Mike Aylward, Greg Nesbit, and Paul Hawley. The agreement may also be inferred from all the circumstances and the conduct of those persons just named.

It is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of a conspiracy and in furtherance of it as evidence pertaining to a defendant even though they were done or made in the absence of and without the knowledge of a defendant. This includes acts done or statements made before a defendant had joined the conspiracy, for a person who knowingly, voluntarily, and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy. Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.

Count II of the indictment charges a conspiracy to commit two separate crimes or offenses, i.e., conspiracy to distribute a mixture or substance containing a detectable amount of anabolic steroids, and conspiracy to possess such a mixture or substance with the intent to distribute it. It is not necessary for the government to prove a conspiracy to commit both of those offenses. It would be sufficient if the government proves, beyond a reasonable doubt, a conspiracy to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses was the subject of the conspiracy. If you cannot agree in that manner, you must find the defendant not guilty.

To assist you in determining whether there was an agreement or understanding to commit the crime of distribution or to commit the crime of possession with intent to distribute a mixture or substance containing a detectable amount of anabolic steroids, as required by element one of this instruction, you are advised that the elements of the actual crime of distribution of such a mixture or substance would be as follows:

First, a person intentionally transferred such a mixture or substance to another person; and

Second, at the time of the transfer, the person making the distribution knew that it was such a mixture or substance.

You are further advised that the elements of the actual crime of possession with intent to distribute such a mixture or substance would be as follows:

First, a person was in possession of such mixture or substance;

Second, such person knew that he was or intended to be in possession of such a mixture or substance; and

Third, such person intended to distribute some or all of such mixture or substance to another person.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	8:99CR60
Plaintiff,	)	Omaha, Nebraska
vs.	)	August 2, 1999
DANIEL J. STEYSKAL,	)	11:02 a.m.
Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM G. CAMBRIDGE
UNITED STATES DISTRICT JUDGE AND A JURY

* * *

(At 2:50 p.m. on August 2, 1999, with counsel for the parties and the defendant present, and the jury NOT present, the following proceedings were had:)

THE COURT: We'll have the jury in here in a minute, but I want to inquire about a matter. You

apprised me in chambers that Mr. Palazzo is representing a witness who is going to be called by the government –

MS. MORAN: Correct.

THE COURT: – and testify against the defendant?

MS. MORAN: I don't know whether he'll testify or not. The guy's name is John Britton. He is currently charged in federal court in Wyoming. And the government alleges that he's part of this conspiracy.

I issued a subpoena to him. You have an order compelling him to testify if he refuses to do that. I heard last week – Mr. Palazzo called me and informed me he may be

* * *

[84] MR. PALAZZO: Your Honor, the case law on the point is that as long as I don't participate in the cross-examination of Mr. Britton, my client, then it doesn't impose a conflict at all.

THE COURT: Where is your brief on that?

MR. PALAZZO: I'd be happy to supply the Court with points and authorities on that issue.

THE COURT: All right. When?

MR. PALAZZO: I can do that tomorrow morning if you'd like, unless you want it earlier than that.

THE COURT: I'd like it tonight. And I'm conditionally allowing you in here just on the basis of a ruling with regard to that issue.

MR. PALAZZO: Very well.

MR. HERZOG: Judge, if you'll refer to the motions of the defendant Steyskal dated July 30, 1990 –

THE COURT: July 30?

MR. HERZOG: July 30th, yes, sir.

THE COURT: And filed . . .

MR. HERZOG: The 30th. I have a copy for the Court

THE COURT: You filed it the 30th. I'm not going to have this trial fouled up with a conflict of interest. You guys get your briefs to me and get them to me by 6:00 tonight. Also, I want one from the government with regard

* * *

[162] time or not?

THE COURT: No, that won't be necessary but I don't want him moving around much. There's going to have to be a good reason for it.

MS. MORAN: Okay.

MR. HERZOG: One additional point – well, I'll wait until Ms. Moran returns.

THE COURT: Now, one more point, I'm sorry, I meant to take up. Before you call your witness, I want to take up this matter that just came to the Court's attention yesterday where apparently Mr. Palazzo has heretofore represented Mr. Britton who may – as I understand it, who may or may not be called as a witness on behalf of the government.

On August 2 – pardon me, on July 30, last Friday morning, the government filed a motion for order compelling testimony from a John Britton. It was filed at 10:23. And them Mr. Palazzo filed an application for admission pro hoc vice at 10:37, 15 minutes later, although he said yesterday that he started representation of the defendant Steyskal approximately 30 days ago, as I understand it.

And it raises the potential of a conflict of interest here. If Palazzo has heretofore represented Britton, which I don't know for a fact but as I undersand from what transpired yesterday, that's apparently the case, and I [163] don't know, maybe intends to continue to represent him if he's called as a witness here, I've got a duty under the law to balance the defendant Steyskal's right to have counsel of his choice against any possible conflict of interest that might be involved and to prevent him from being in a situation, that is to say, the defendant Steyskal, from having counsel that has a conflict of interest.

A lawyer is not to represent a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes the representation of that client will not adversely affect the relationship with the other client and each client can sense, after consultation.

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interests unless, one, the lawyer reasonably believed the representation will not be adversely affected; and, two, the client consents, after

consultation. When representation of multiple clients on a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Is it true that you have – now you said that you started representing the defendant Steyskal, what, 30 days [164] ago?

MR. PALAZZO: That's correct.

THE COURT: Why is it you didn't make an appearance in this court?

MR. PALAZZO: I wasn't certain the matter was going to proceed to trial. When I learned it, in fact, was going to proceed to trial and it had, in fact, been accelerated by at least one day, then I saw fit to file the pro hoc vice application.

THE COURT: Trial doesn't determine whether or not you're to make an appearance under our rules. When you represent somebody, you make the appearance at the time you have taken on the representation, Mr. Palazzo, not – whether or not it goes to trial has absolutely nothing to do with it.

MR. PALAZZO: I had not taken on an active role, I should say, originally. And it became much more apparent that my involvement would be much more deliberate and focused, and that's why the pro hoc vice application was filed.

THE COURT: Is it true you're representing Mr. Britton or have represented him?

MR. PALAZZO: I have represented him in connection with a motion to suppress in Wyoming before a federal judge there which has been under advisement for about one year [165] now.

We have every understanding that the motion is going to be granted. I don't understand what the delay has been, but I'm quite optimistic that the matter is going to favorably result to Mr. Britton.

Furthermore, as I pointed out, your Honor, yesterday, courts have indicated that when you have a conflict – a potential conflict as what has arisen here, as long as the attorney, in the case myself, who formerly represented Mr. Britton in Wyoming, doesn't participate in the cross-examination of Mr. Britton in the context of this case, that allays any concerns of a conflict and then still maintains some consistency with the sixth amendment right to counsel, so it harmonizes those two issues. There was a case that –

THE COURT: That's just one element of the potential conflict, you know, is cross. There's other elements. Confidential communications –

MR. PALAZZO: As I pointed out –

THE COURT: Do you intend to represent Mr. Britton if he's called as a witness here by the government?

MR. PALAZZO: No, I don't, your Honor. And furthermore, as I pointed out yesterday, I have basically erected what would be, by analogy, a Chinese wall between myself and Mr. Herzog as it relates to matters

concerning [166] Mr. Britton. So there's been no communication from myself to Mr. Herzog as it relates to any confidential communications that I previously had with Mr. Britton.

THE COURT: Well, isn't there a potential that because you haven't done that – and I take it from what you say, are going to continue to do it in the future – that that could result in your not representing one or either of the parties, either Mr. Steyskal or Mr. Britton, unsatisfactorily?

MR. PALAZZO: No, your Honor, because Mr. Herzog obviously will be representing the interests of Mr. Steyskal as it relates to the cross-examination of Mr. Britton to elicit any favorable testimony that would be adduced by Mr. Britton on behalf of Mr. Steyskal.

And furthermore, Mr. Steyskal, if he has not already done so, is prepared, based upon any canvass by the Court, to knowingly, intelligently, and voluntarily waive any such conflict in order that he may continue to retain me for further representation in the context of this trial.

THE COURT: Well, have you explained to Mr. Steyskal the implications of your common representation of him and Mr. Britton and the advantages and risks involved in that?

MR. PALAZZO: I have, your Honor.

THE COURT: What have you explained specifically to

* * *

[170] MR. PALAZZO: I certainly don't want to give any advantage to the prosecution by having me sit here and talk to the Court about privileged communications I've had with Mr. Britton, but that's the essence of it, yes, sir.

THE COURT: Mr. Steyskal, have you heard what Mr. Palazzo said here?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you agree with everything he said?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand here that there could conceivably be some type of potential conflict due to the fact that he's – you've chosen him now to represent you and he's also been representing Mr. Britton?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you, of course, have a constitutional right to have the attorney represent you that you want, subject to my trying to ensure that you don't select counsel that is incompetent or inadequate counsel because of a potential conflict of interest. Do you understand that, Mr. Steyskal?

THE DEFENDANT: Yes, your Honor.

THE COURT: And are you reasonably satisfied that – either that Mr. Palazzo neither has a conflict or that if he does have a conflict, you nevertheless, notwithstanding [171] that, want him to continue to represent you in this matter?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: And is that your voluntary act and deed?

THE DEFENDANT: Yes, it is, your Honor.

THE COURT: Would you object to my discharging Mr. Steyskal (sic) as your counsel in this matter?

MR. HERZOG: You mean Mr. Palazzo?

THE COURT: Pardon me, I mean Mr. Palazzo in this matter?

THE DEFENDANT: Yes, I would, your Honor.

THE COURT: And so if there's any conflict of interest here, you're telling me that you waive it; is that correct?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: And that's your voluntary act and deed?

THE DEFENDANT: That is my voluntary act, your Honor.

THE COURT: All right. You may be seated. I'm going to allow you, Mr. Palazzo, to continue as counsel for Mr. Steyskal. I dare say that you will not be able to represent Mr. Britton if he's called.

MR. PALAZZO: Thank you, your Honor.

THE COURT: All right. Let's get the jury in here.

MR. HERZOG: Judge, may I be heard on one quick

* * *

[443] Q. What locality is Mr. Palazzo's office?

A. Las Vegas, Nevada.

Q. And how did Mr. Palazzo come to be your attorney in your Wyoming case?

MR. HERZOG: Judge, may we approach?

THE COURT: No.

MR HERZOG: My objection is – I object.

THE COURT: Overruled.

MR. HERZOG: Basis is relevance, foundation, ask for relief under 403.

THE COURT: Overruled.

A. I don't recall.

BY MS. MORAN:

Q. How did you hear his name?

MR. HERZOG: Objection, calls for hearsay, not relevant.

THE COURT: Sustained.

BY MS. MORAN:

Q. Did you know Mr. Palazzo prior to his representation of you?

MR. HERZOG: Same objections, your Honor, relevance, ask for relief under 403.

THE COURT: Sustained.

BY MS. MORAN:

Q. Did you pay for Mr. Palazzo's services as your attorney?

* * *

[456] A. I don't really recall, around town somewhere maybe.

Q. When did you see him prior to that?

A. I don't recall.

Q. How would you describe your relationship with him?

A. Good friends.

Q. Are you still good friends?

A. Yes.

Q. How good of friends were you with him in February of 1998?

A. Pretty good friends.

Q. Did you get the name of Mr. Palazzo for an attorney from Mr. Steyskal?

MR. HERZOG: Objection, Judge, it's not relevant, no foundation, ask for relief under 403.

THE COURT: Sustained.

BY MS. MORAN:

Q. Did Mr. Steyskal pay for your legal bill to Mr. Palazzo?

A. No, he didn't.

MR. HERZOG: Objection, not relevant, foundation, relief under 403.

THE COURT: Overruled.

A. No, he didn't.

BY MS. MORAN:

Q. And how was it that you chose Mr. Palazzo, sir, as your representative?

[457] MR. HERZOG: Judge, that's not relevant, no foundation, ask for relief under 403.

THE COURT: Sustained.

MS. MORAN: May we approach, your Honor?

THE COURT: You may.

(Bench conference on the record.)

MS. MORAN: The association between the two individuals and being represented by the same lawyer when he's arrested in Laramie, Wyoming and this guy practices out of Las Vegas, Nevada is, in fact, for the jury. There is some documentation in Mr. Steyskal's room in the B Street address that has Mr. Palazzo's name on it. I would argue that that is too big of a coincidence. At least it's a relevant fact, your Honor, that he still represents him and that it goes to motive.

MR. HERZOG: Judge, what it also does is besmirches, taints and places Mr. Palazzo in a bad light before this jury in their fact-finding function. It's an attempt on the part of the government to drive a wedge between Mr. Steyskal and his counsel.

I ask you for relief under 403 and all the other objections that I have –

THE COURT: I stand on my ruling.

(End of bench conference.)

BY MS. MORAN:

* * *

[469] Q. At any time between your – when you left the bay area and when you were stopped in Wyoming, did you ever stop and check in your trunk?

A. I don't recall if I did or not.

MS. MORAN: Can I have one minute, your Honor?

(Off-the-record discussion had.)

BY MS. MORAN:

Q. I believe you testified, sir, too, that you don't remember when you retained Mr. Palazzo; is that correct?

A. Shortly after I was arrested.

Q. And do you recall how you got ahold of him?

A. One of my parents, either my mother or my father got his name somehow.

Q. And do you know Chad Hamor?

A. Yes, I do.

Q. Do you know – I believe you testified you knew Pierre Brownell; is that right?

A. Yes.

Q. Do you know Tom Holzapfel?

A. I know who he is.

Q. Did you see him outside today?

A. Yes.

Q. You know Paul Hawley?

A. Yes.

Q. How about Jake Dailey, do you know him?

* * *

[472] A. I don't remember.

Q. Did you stop between here and Vegas?

A. I don't believe I did.

MS. MORAN: Nothing further

THE COURT: You may cross.

MR. HERZOG: Let me review my notes, Judge, I may not, but just –

(Off-the-record discussion had.)

MR. HERZOG: No cross, your Honor.

THE COURT: You may step down. You may call your next witness.

COURTROOM DEPUTY: State your full name for the record and spell your last name.

THE WITNESS: Dan Dyer, D-y-e-r.

DAN DYER, PLAINTIFF'S WITNESS, SWORN

THE COURT: You may inquire.

DIRECT EXAMINATION:

BY MS. MORAN:

Q. Would you state your name and occupation, please?

A. Dan Dyer, state trooper for the Wyoming highway patrol.

Q. How long have you been with the highway patrol, sir?

A. Twenty-two years.

Q. What geographic area do you cover, sir, within your assignment?

A. Mainly around the Laramie, Wyoming area.

* * *

[474] Q. What was found?

A. Two hundred pounds of marijuana with wrappings. I think it was a little bit less without the wrappings.

Q. And where was that located within the vehicle, sir?

A. In the trunk.

Q. Was Mr. Britton arrested following the – you finding the marijuana, sir?

A. Yes, he was.

Q. And as far as you know, sir, is his – are charges still pending against Mr. Britton?

A. Yes.

Q. And in what court is that?

A. It's up in Casper, Wyoming, in federal court up there.

Q. And who represents him in that action?

MR. HERZOG: Objection, that's – that's not relevant. It's – ask for relief under 403.

THE COURT: Sustained.

BY MS. MORAN:

Q. Have you appeared in any court proceedings in that case, sir?

A. Yes, I did.

Q. Have you been placed under examination in that court?

A. Yes.

Q. Have you been cross-examined?

A. Yes.

[475] Q. By who?

A. Mr. –

MR. HERZOG: Judge – objection – objection – please, sir; foundation, relevancy, relief under 403.

THE COURT: Overruled.

A. By Mr. Palazzo from Las Vegas, I believe.

BY MS. MORAN:

Q. The marijuana that was – you said you found in the trunk, sir, what happened to that marijuana?

A. A DCI agent, Division of Criminal Investigation agent from Wyoming took it over to Cheyenne that evening and put it in their lab, I believe.

Q. At the time of Mr. Britton's arrest, did he request a lawyer?

A. Yes, he did.

Q. And did he – was he any more specific as to a lawyer that he wanted?

MR. HERZOG: Objection.

A. He –

MR. HERZOG: Foundation, form, ask for relief under 403. The lawyer's not on trial.

THE COURT: Overruled.

A. He didn't give any names, but he said he had a lawyer that he knew in Las Vegas and one in Omaha.

MS. MORAN: Nothing further.

* * *

[485] the part of the government against Mr. Steyskal.

Then there's a second issue I wanted to address with the Court, if I may.

Your Honor, there were what we would characterize as improper references amounting to prosecutorial misconduct with regard to Mr. Britton, his post-arrest silence and the comments that were made by Ms. Moran in questioning by Ms. Moran concerning his post-arrest silence. Certainly that's a Miranda right that he enjoys. It was inappropriate to bring that fact out and mention that to the jury.

Additionally, regarding the issue of myself, Louis Palazzo, from Las Vegas representing Mr. Britton in the Wyoming matter and at the same time having now represented Mr. Steyskal, I thought that that was also prosecutorial misconduct to bring that to the jury's attention and certainly inflamed the jury with regard to drawing whatever inferences, mostly negative I would imagine, without fully being able to develop the basis for the retention of myself and – by Mr. Britton as well as the retention of myself by Mr. Steyskal.

Certainly there is nothing criminal about someone referring a lawyer to another person when that person feels that the lawyer's done a good job on his behalf.

So I think those two grounds constituted mistrial and we would motion for mistrial at this time.

[486] THE COURT: Your motion for mistrial is denied.

All right. I again remind you counsel that if you've got matters such as this, I want to hear about them on our time, your and my time, not the jury's time. So please get to me before the jury is supposed to be brought in.

MS. MORAN: Your Honor, I have one item. The second witness, not the first witness that will testify but the second witness who will testify this afternoon is Craig Beaty. I believe I submitted a motion to you for an immunity order. If the Court wishes, maybe you want to address – Mr. Beaty is here, if you want to address that issue with him before he testifies and before we bring the jury in so we wouldn't have to take a break.

THE COURT: All right. Bring him in.

MS. MORAN: I think I did submit a proposed order, your Honor.

COURTROOM DEPUTY: State your full name for the record and spell your last name.

THE WITNESS: Craig Steven Beaty, B-e-a-t-y.

CRAIG BEATY, PLAINTIFF'S WITNESS, SWORN

THE COURT: You may inquire.

DIRECT EXAMINATION:

BY MS. MORAN:

Q. Would you state your name, please, sir?

A. Craig Steven Beaty.

* * *

[746] THE COURT: You may.

BY MS. MORAN:

Q. On one of the inside front covers, I ask you does a name appear to be on that page?

A. Yes, there is.

Q. What's the name?

A. Looks like Penquin. There's also a name Bear, and then it says "second" and then it says "first".

Q. Okay. About five or six pages down, I want you to look and see if you see a name Paul Youthkins?

A. Yes, I do.

Q. Okay. Another three or four pages, six pages maybe, do you see another name?

A. There's a Jane Milan. Have I gone too far? The name is Louie Palazzo, 520 South 4th Street, Las Vegas, Nevada.

Q. Other than the notebooks, sir, is there a car rental receipt in there?

A. Yes, ma'am, there is.

Q. And who is that receipt for? What's the name on that?

A. Dan Steyskal.

Q. Can you tell the rental date?

A. It was rental – rented 6-17 of '98 and to be returned 6-24 of '98.

Q. And is there another blank or another just laying loose piece of paper that has the name Penquin on it?

* * *

[838] Hamor and Dailey both tell you Britton was bringing marijuana in and was caught with it in Utah – excuse me, in Wyoming. You that know it happened in February near Laramie, Wyoming, caught with 180 pounds of marijuana. Was it destined to the defendant? I submit to you that it was. Hamor said he was in the car with the defendant and Brownell when he paged the defendant. Upon checking the page Britton tells you – Britton says to Mr. Steyskal he was worried because it looked like he was going to be stopped. Hamor also tells that he brought in an earlier load of marijuana for him.

When Mr. Britton took the stand I didn't know what he was going to say. I suspected he was going to say that he brought it in for himself because then he doesn't have to pin it on anyone else, it's only himself.

But he said no. He said it was someone else. We know why. He isn't going to hurt him because he's represented by him, the same guy as represented by him. That was obvious.

MR. PALAZZO: Objection.

THE COURT: Overruled.

MS. MORAN: So he says it's a guy named Jason. There's a name attached to a person like Jason, a person who has no last name, a person who has no phone number, a person who has no real identifying characteristics. No job, no address. You call him the tall, dark stranger because you

* * *

[883] small amount of steroids from the defendant in 1995 and later, the amount not being delineated in the evidence; 100 pounds of marijuana packaged at Holzapfel's, all as testified to by Hamor on page 133 of the transcript and surrounding pages. That's a total of – well, that's a total of 800 pounds of marijuana.

Just under 200 pounds of marijuana in Britton's car at the stop, all as testified to at pages 357 and surrounding pages of the transcript; 100 to 150 bottles of Laurabolin distributed in Colorado Springs, all as testified to at page 399 of the transcript and surrounding pages; 10 to 20 pounds of marijuana per month from mid 1997 to January 1999, all as testified to by Jacob Dailey at page 438 of the transcript and surrounding pages; steroids that Dailey received from the defendant. He testified that he didn't know how much he had received from the defendant but there were steroids that he did receive from the defendant, all as testified to by Dailey at page 446 and surrounding pages of the transcript; more than 20 but less than 50 strips of oral steroids containing ten pills per strip received by Dailey from the defendant, all as testified to on page 448 of the transcript and surrounding pages; page 460 of the transcript and surrounding pages. Dailey in testimony corroborated Hamor as to two deliveries of marijuana to the Plaza apartment by Mullins to the defendant in different amounts; six pounds of

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